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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR R. GOSEY,

Defendant and Appellant.

B207666

(Los Angeles County
Super. Ct. No. YA068382)

APPEAL from a judgment of the Superior Court of the County of Los Angeles,
Laura C. Ellison, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Plaintiff and
Respondent.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephanie
A. Miyoshi and Michael C. Keller, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A patrolling deputy observed defendant and appellant Arthur Gosey (defendant),
who was on parole, holding a handgun while riding in the front passenger seat of a car.

Defendant was arrested and charged with possession of a firearm by a felon. Following a jury trial, he was convicted.

On appeal, Defendant contends that the prosecutor committed prejudicial misconduct during cross-examination and closing argument. In the alternative, he contends he received ineffective assistance of counsel based on his trial counsel's failure to object to the alleged prosecutorial misconduct.

We hold that defendant forfeited his claims of prosecutorial misconduct by failing to object to the alleged misconduct and request a curative instruction in the trial court. We further hold that we cannot determine his claim of ineffective assistance of counsel based on the record before us. Such a claim will have to be submitted in a petition for writ of habeas corpus. We therefore affirm the judgment.

FACTUAL BACKGROUND

On the evening of April 18, 2007, defendant was riding in the front passenger seat of a gray Pontiac Grand Prix, along with the driver and another man who was seated behind defendant. When the Grand Prix failed to stop at a stop sign, two patrolling deputies from the Los Angeles County Sheriff's Department followed it. The Grand Prix pulled to the curb and the deputies exited their patrol car and approached the vehicle. One of the deputies observed defendant with a handgun, and drew his own handgun. The Grand Prix then drove away and the deputies returned to their vehicle, activated their lights and siren, and initiated a pursuit. Using their spot light and the passenger mirror of the Grand Prix, the deputies observed defendant lean forward, and it appeared he was "stuffing something towards the floorboard."

The Grand Prix again pulled to the curb, but before it came to a complete stop defendant jumped from the moving vehicle and ran. One of the deputies pursued him, while the other stayed with the driver and the rear seat passenger, each of whom remained in the Grand Prix.

The pursuing deputy lost sight of defendant, but a police dog eventually found defendant hiding under a car. The pursuing deputy searched the Grand Prix and found a handgun under the front passenger seat. The deputy interviewed defendant who told the deputy that he ran because he did not want to go back to jail “for another gun.” Defendant stated that he had just been released from prison and knew he would return to prison if he were caught with a gun. The prosecution and defense stipulated that defendant had a prior felony conviction.

Defendant testified and admitted he was the front passenger in the Grand Prix that evening and that he ran the second time the Grand Prix pulled to the curb. But he denied having a handgun, and he knew being in possession of a firearm would violate the terms of his parole. According to defendant, when the Grand Prix drove away from the deputies after the first stop, the driver declared that he had a gun in the vehicle. Defendant told the driver to pull over again and ran because he knew there was a gun in the Grand Prix. Defendant denied making any admissions to the deputies after his arrest.

PROCEDURAL POSTURE

The Los Angeles County District Attorney charged defendant in an information with one count of felon in possession of a firearm in violation of Penal Code section 12021, subdivision (a)(1),¹ a felony. The District Attorney further alleged that defendant had suffered two prior felony convictions for which he served a prison term within the meaning of section 667.5, subdivision (b). Defendant pleaded not guilty and denied the special allegations.

Following his second jury trial,² defendant was convicted as charged and admitted the two prior prison term enhancements under section 667.5, subdivision (b). The trial

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The jury in defendant’s first trial deadlocked resulting in a mistrial.

court sentenced defendant to the upper term of three years, plus an additional two years pursuant to section 667.5, subdivision (b).

DISCUSSION

A. Prosecutorial Misconduct Claim

1. Background

Defendant contends that the prosecutor committed prejudicial misconduct, both during cross-examination and during closing argument. During cross-examination, the prosecutor asked defendant several questions seeking to elicit admissions that the arresting deputies had testified truthfully about the events leading to defendant's arrest, and defendant admitted that they had. The prosecutor then asked the following questions:

“[Prosecutor]: And [the arresting deputies] told the truth about all those areas?
[Defendant]: There [were] things in between that you didn't mention, but yes.
[Prosecutor]: So isn't it true that Deputy Pratt [one of the arresting deputies] also told the truth when he said that he saw you with a gun in your hands? [Defendant]: No, that's not the truth, sir. [Prosecutor]: Is it your testimony that even though Deputy Pratt told the truth about all those areas, . . . he lied about the gun in your hands? [Defendant]: He lied about a few things, but yes. . . . [Prosecutor]: Did Deputy Pratt give you an opportunity to make a written statement? [Defendant]: No, sir. Not at all.
[Prosecutor]: So its your testimony that Deputy Pratt, a deputy Sheriff of 13 years, lied about seeing you with a gun in your hands? [Defendant]: Yes, sir. [Prosecutor]: And he lied? [Defendant]: It's obvious the way he said he saw me. [Prosecutor]: He lied about seeing you hide the gun as well? [Defendant]: Yes, sir. . . . [Prosecutor]: And he lied about the statements that you made? [Defendant]: Yes, sir. [Prosecutor]: And is it your testimony that Deputy Leon [the other arresting deputy], a sheriff for 12 years, also lied about seeing you hide a gun under the front seat? [Defendant]: Did he say he saw me hide a gun? I think he said he [saw] me make a movement. I don't think he said he [saw]

me hide a gun. [Prosecutor]: Did you make those movements? [Defendant]: No, I didn't make those movements at all, sir. [Prosecutor]: So he lied about that? [Defendant]: Yes, sir."

Based on the foregoing questions, defendant argues that the prosecutor committed misconduct. From defendant's perspective, those questions violated the rule against allowing lay opinion about the veracity of another person. (See *People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Zambrano* (2004) 124 Cal.App.4th 228, 239-241 [asking the defendant "were they lying" questions about arresting officers with whom the defendant had no prior contact or relationship was improper]; but see *People v. Chatman* (2006) 38 Cal.4th 344, 384 [a trial court may permit "were they lying" questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions].)

During closing argument, the prosecutor questioned why the defense had not called the passenger in the back seat of the Grand Prix to corroborate that the driver, not defendant, had the handgun on the night of defendant's arrest. According to defendant, that argument constituted misconduct because the prosecutor³ knew that at defendant's first trial the back seat passenger had testified that the driver declared he, the driver, had a gun and threw it into the back seat when he noticed the deputies following him.

2. *Forfeiture*

"Improper remarks by a prosecutor can "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 2471, 91 L.Ed. 2d 144]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642 [40 L.Ed. 2d 431, 94 S.Ct. 1868, 1871]; cf. *People v. Hill*

³ The prosecutor for defendant's second trial also served as the prosecutor for defendant's first trial.

(1998) 17 Cal.4th 800, 819 [72 Cal.Rptr.2d 656, 952 P.2d 673].) Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair. (*People v. Hill, supra*, 17 Cal.4th at p. 819; *People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [25 Cal.Rptr.2d 867, 864 P.2d 40] (*Berryman*); *People v. Price* (1991) 1 Cal.4th 324, 447 [3 Cal.Rptr.2d 106, 821 P.2d 610] (*Price*).)” (*People v. Carter* (2005) 36 Cal.4th 1114, 1204.)

“Nevertheless, as a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm. . . . (*Berryman, supra*, 6 Cal.4th at p. 1072 [rejecting defendant’s claim of prosecutorial misconduct both for failure to object or request admonition at trial[,] and on the merits]; *Price, supra*, 1 Cal.4th at pp. 447, 460–462 [declining to address whether prosecutors committed misconduct[,] because defense did not object at trial]; *People v. Monteil* (1993) 5 Cal.4th 877, 914 [21 Cal.Rptr.2d 705, 855 P.2d 1277] . . . [although trial counsel objected to prosecutor’s remarks at trial, the failure to request admonition failed to preserve claim of prosecutorial misconduct on appeal].)” (*People v. Frye* (1998) 18 Cal.4th 894, 969–970 [77 Cal.Rptr.2d 25, 959 P.2d 183]; see also *People v. Ochoa* [(1998)] 19 Cal.4th 353, 427.)” (*People v. Carter, supra*, 36 Cal.4th at p. 1204.)

Defendant concedes that his trial counsel failed to object or request a curative instruction to either of the acts of alleged misconduct, but makes no argument against the Attorney General’s assertion of forfeiture. Because there is nothing in the record that would support an exception to the application of the forfeiture rule in this case,⁴ we hold that defendant forfeited his claims of prosecutorial misconduct.

⁴ “A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile.” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Here, because no objections or rulings were made to the questions and comments in issue, there is no basis upon which to assert the futility exception to the forfeiture rule.

B. Ineffective Assistance of Counsel

Defendant argues that if we determine he forfeited his misconduct claim by his trial counsel's failure to object to the claimed misconduct, then it follows that defendant received ineffective assistance of counsel at trial. According to defendant, there is no rational explanation for his trial counsel's inaction in the face of the claimed misconduct.

“Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.’ (*People v. Rodriguez* [(1994)] 8 Cal.4th [1060,] 1126; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [108 Cal.Rptr.2d 291, 25 P.3d 519] [explaining that first component is established by demonstrating ‘that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney’].)” (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.)

“A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to the effective assistance of counsel,’ but the appellate record rarely demonstrates ‘that the failure to object was the result of counsel's incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel's actions or omissions can be explored.’ ([*People v.*] *Lopez* [(2008)] 42 Cal.4th [960,] 966; see *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267 [62 Cal.Rptr.2d 437, 933 P.2d 1134].)” (*People v. Salcido* (2008) 44 Cal.4th 93, 152.)

Here, the record is silent as to the reasons why defendant's trial counsel did not object to the alleged acts of misconduct during cross-examination or during closing

argument.⁵ Contrary to defendant's assertion, we cannot conclude on this record that there was "no rational tactical purpose for [trial counsel's] act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.) As to the cross-examination issue, defendant's trial counsel may have believed defendant's argumentative responses to the allegedly improper questions were helpful to his defense or that objecting would have only highlighted the issue for the jury. As to the prosecutor's remarks during closing argument, the record is silent as to why defendant did not call the backseat passenger as a witness at the second trial. Absent such information, we cannot determine whether the passenger was unavailable to testify at the second trial or whether defense counsel⁶ decided not to call him because, for example, his testimony had changed since the time of the first trial. If his testimony had changed and was no longer favorable to defendant, defense counsel would have had good reason not to call him and no basis upon which to object to the prosecutor's comments in closing argument. Because the record sheds no light on the reasons, if any, for trial counsel's failures to object, we cannot determine the ineffective assistance issue on appeal. The issue would be more appropriately litigated on habeas corpus.

⁵ We note, however, that "deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

⁶ The same attorney represented defendant at both the first and second trials.

DISPOSITION

The judgment of the trial court is affirmed.

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MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.